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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 166

WILLIAM F. WOLFF, SR.,
Petitioner,
vs.
UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment in the above case of the United States Court of Appeals for the Sixth Circuit, entered in this cause on March 25, 1965. A petition for rehearing was denied on April 21, 1965.

OPINION BELOW

The opinion of the court of appeals has not as yet been reported, but it is printed in the appendix, (App. 25-38). There was no official report of the case in the United States District Court for the Eastern District of Michigan, Southern Division.

JURISDICTION

The opinion of the Court of Appeals was entered on March 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

I.

Whether the variance between the indictment and the proofs affected the defendant's substantial rights when:

(A) The proofs and the Court's instructions allowed the jury to find the defendant guilty of an offense not charged in the indictment.

(B) The evidence proved a different manner of violating the statute than was charged in the indictment.

II.

Whether the government proved beyond a reasonable doubt the crime charged:

(A) When the element of wilfulness and knowledge was proved only by uncorroborated admissions of the defendant.

(B) When the element of payment and delivery of checks was not established in the district in which the defendant was tried.

STATUTES INVOLVED

The pertinent statutes are printed in the appendix (App. 38-39).

STATEMENT

The petitioner, William F. Wolff, Sr., was indicted for violation of Section 186(a) of Title 29 U.S.C.A. by paying and delivering and causing his employer, Youngstown Cartage Company, to pay and deliver certain amounts of money at certain times to his co-defendant, a labor representative of Youngstown's employees. The joint indictment against both the defendants was in 64 counts, and the 32 counts which were applicable to petitioner were identical except for the time and amount of payment alleged:

> "That on or about the 8th day of December 1956, defendant, William F. Wolff, Sr. did unlawfully, wilfully and knowingly pay and deliver and did unlawfully, wilfully and knowingly cause Youngstown to pay and deliver to Rolland B. McMaster, in the Eastern District of Michigan the sum of $172.24, in violation of section 186(a) of Title 29, United States Code and section 2 of Title 18, United States Code." (Count 33, 19a.)

The corresponding 32 counts against Rolland B. McMaster, his co-defendant, were also identical except for time and amount paid:

> "That on or about the 8th day of December 1956, in the Eastern District of Michigan, defendant, Rolland B. McMaster, did unlawfully, wilfully and knowingly receive and accept from Youngstown through Ram Transport Inc. the sum of $172.24, in violation of section 186 (b) of Title 29, United States Code." (Count I, 6a.)

The government first called an F.B.I. Agent who testified as to three conversations with the petitioner in 1961, concerning 36 checks counter-signed by petitioner and pay-

able to Ram Transport, Inc., a Michigan corporation (103a). The Agent stated the petitioner informed him the checks were for rental of a tractor from Ram Transport, Inc. for use in the Youngstown terminal in Detroit, pursuant to an agreement between himself and the owner and/or operator of Ram Transport, Inc. on one occasion (110a); and pursuant to an agreement between himself and his co-defendant, McMaster, on another occasion (106a). The Agent further testified that the petitioner informed him the rental price was $3.00 per hour and that the number of hours of use was to be reported to Youngstown's Office Manager, Flamini, or some other corporate officer and Flamini would then draw checks to Ram based upon the number of hours of which he was informed (107a-112a).

The 36 checks were offered in evidence and received over the objection of petitioner that the indictment charged him with paying to McMaster, whereas the checks were made out to Ram Transport, Inc., a corporation (114a-116a). The Court received the checks in evidence on the ground that the government had stated it intended to prove that McMaster *was* Ram Transport, Inc. and that it expected to show that this was the agency through which the payments were made (117a).

The government called 57 other witnesses. Of this number, 45 were called to refute the claim attributed to the petitioner, through the F.B.I. Agent's testimony, that the payments made pursuant to the alleged agreement, were for the use of a tractor. The majority of these witnesses, some 30 in number, were drivers, clerks, and dispatchers of Youngstown, both in Detroit, and Youngstown, Ohio. Each testified he either knew of no such agreement, and had neither seen nor used such a tractor, or that he had seen a tractor but it was not used or was inoperable, or

that he had seen such a tractor but was uncertain as to its use, color, make and when it was at the Detroit terminal.

One witness was called who had been employed by Youngstown as a midnight dispatcher for one and one-half weeks in May 1956, six years prior, and seven months before the date the first offense was allegedly committed (1002a). Although he did not remember whether he worked there in 1956 or 1957, he did remember that he never heard of Ram Transport, Inc. during this week and did not hear of any lease of a tractor during this week.

Some of the officers and executives testified they had knowledge of the agreement for rental from Ram Transport, Inc. Flamini, the Office Manager, testified he received, from time to time, the report of the hours which the tractor was used (230a-235a). Two other witnesses gave testimony of their recollection of a rental agreement (263a, 839a). The government also introduced into evidence a letter from the petitioner (117a) to Ram Transport, Inc., which set out the terms of the rental agreement (164a). A second letter was offered but was refused because the F.B.I. agent could not identify it (136a). However, the contents were brought out by examination which showed the letter was to terminate the agreement (140a-141a).

The other 11 witnesses were called to demonstrate that Ram Transport, Inc. was owned or controlled by McMaster and that he received certain sums of money from the corporation during and after the period in which the checks were received by it. The evidence did not indicate, nor did the government contend, that Ram Transport was merely a "sham" corporation. On the contrary, the evidence demonstrated that it constituted, and was operated as, a bona fide corporation. None of the checks were endorsed or negotiated by McMaster (719a) and he testified that he received none of the proceeds (1421a-1422a).

The record contains no evidence that the petitioner "wilfully and knowingly paid and delivered and caused Youngstown to pay and deliver" any sum of money to the co-defendant, McMaster. The only evidence against the petitioner was that most of the checks to Ram bore his counter-signature and the uncorroborated statements of knowledge of a connection between Ram and the co-defendant, attributed to him by the F.B.I. Agent. The government called over 40 witnesses to counter a defense which was not made, i.e. a bona fide business transaction under Section 186(c)(3). The petitioner did not make this defense, or any defense; he merely cross-examined the array of witnesses presented by the government. The first claim by the petitioner that he relied on the exception of a bona fide business transaction was in the discussion on the charges to be given by the Court (1848a-1853a).

The 36 checks introduced in evidence as proof of the payment by the petitioner to the co-defendant were all drawn on an Ohio bank. The testimony established that the checks were deposited in an account of Ram Transport, Inc. in Detroit. There was no evidence that the checks were paid in the Eastern District of Michigan. Indeed, there was no evidence concerning the place or method of delivery. The petitioner made Motions for Judgment of Acquittal, at the close of the government's case (1354a) and at the close of all proofs (1791a), which were denied.

The Court in charging the jury refused to give an instruction requested by the co-defendant (2061a), that the Statute of Limitations would bar any conviction for *agreeing* to make the prohibited payments (2038a). The Court did, however, charge the jury as follows:

> "Defendant Wolff in this case relies upon what is called a statutory exemption. The statute under which the Government brings this prosecution, as I have read it to you—and I better read it right now:

These counts, all of the counts in the indictment, are drawn under Section 186, or at least charge an offense under Section 186 of the United States Code, Title 29, and, in relation to the counts which have to do with Mr. Wolff, the 32 counts charged against Mr. Wolff:

(Reading)

'It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or any——' I will read it over again.

'It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money to any representative of any of his employees who are employed in an industry affecting commerce.'

And the statute, as it applies to the counts charged against Mr. McMaster, read as follows:

(Reading)

'It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money.'

Those are the two sections of the statute, of the law, that have application to all of the counts in the indictment as they apply to both Mr. Wolff—the first section I read applies to the counts charged against Wolff and the second section applies to the counts charged against Mr. McMaster.

And, I will read again:

'Defendant Wolff in this case relies upon what is called a statutory exemption. The statute, part of which I have just read, under which the Government brings this prosecution, as I have read

it to you, provides that the provisions making certain payments unlawful are not applicable with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business. Defendant Wolff having relied upon such an exemption, and evidence having been adduced in regard thereto, the burden of proving that the payments did not fall within the statutory exemption is upon the Government' " (2025a-2027a).

The Sixth Circuit Court of Appeals affirmed the conviction. It held that it was not necessary under the modern rules of pleading to allege the conduit through which the payments were made or to allege each step of the payments. It further held proper venue was established by deposit and collection of the checks, drawn on an Ohio bank, in the Ram Transport bank account in Detroit. This sufficiently represented a payment in the Eastern District of Michigan. In any event, that court said, objection to venue was waived because it was not made prior to the verdict. The opinion was devoted almost entirely to a recapitulation of the facts. The Court concluded the evidence was "overwhelming".

A petition for rehearing was denied on April 21, 1965.

REASONS FOR GRANTING THE WRIT

I. (A) It is the petitioner's contention that the instructions by the court were prejudicial in that the jury may have convicted him of a crime that was not charged in the indictment. The statute declares that it shall be unlawful *to make* the proscribed payments or *to agree to make* the proscribed payments. Each is a separate offense, *Burton v. U.S.*, 202 U.S. 344, 50 L. ed. 1057 (1901). The petitioner was indicted for paying and delivering, and causing Youngstown to pay and deliver money to the co-defendant.

The government's first witness the F.B.I. agent, testified the petitioner had told him of a rental agreement with Ram Transport, Inc., or with the co-defendant. It further established through the same witness, that two letters existed which related to the agreement. The first confirmed the oral agreement and the second terminated it. At least three of the witnesses (Flamini, Altenderfer, Potocki) further bolstered the contention that some sort of agreement did exist. This served to firmly establish in the minds of the jury that an agreement had been made. Thirty-six checks in varying amounts from Youngstown to Ram Transport, Inc. were also introduced in evidence over defense objections. The government proceeded to call more than 40 witnesses to demonstrate that: (1) no tractor was ever received from Ram Transport, Inc., or (2) if it was received, it was not used and/or was not capable of being used. This evidence firmly established in the jury's mind that the payments were made but nothing was received in return. The testimony and exhibits were presented in the government's case-in-chief before any defense was made.

The court refused a request by the co-defendant to instruct the jury that a conviction for agreeing to pay was barred by the statute of limitations. The court instructed the jury by reading the statute, including the portion relating to *agreeing* to pay or to deliver money to a labor representative. It further stated that the section it had read applied to all counts in the indictment as they applied to the petitioner.

The jury was therefore allowed to find the petitioner guilty of either: (1) having made unlawful payments to the co-defendant, or (2) having *agreed* to make unlawful payments to him. It returned a verdict of "guilty as accused".

The jury may have been unconvinced that the checks signed by the petitioner were for the rental due on an

alleged tractor. However, it may also have been unconvinced that the checks knowingly reached the co-defendant. On the basis of the evidence and instruction, it might therefore, have concluded that the petitioner had at least agreed to make the proscribed payments and accordingly returned a guilty verdict. Whether or not this actually happened cannot now be determined. However, the likelihood of this being the case is certainly a strong one, especially in view of the fact that the jury is presumed to have followed the instructions given. *Delli Paoli v. U.S.*, 352 U.S. 232, 242.

The petitioner did not object to the instruction as given. Nevertheless, under the "plain error" rule, an objection is not a mandatory condition precedent to raising the error on appeal. *Title 18, U.S.C.A., Rule 52(b), Rules of Criminal Procedure.* Many cases have held that where "plain error" was committed in the instructions, such error may be raised on appeal even though no objection was made when the alleged erroneous instruction was given, *Sherwin v. U.S.*, 320 F.2d 137, cert. den. 84 S. Ct. 481, reh. den. 845 S. Ct. 796 (1963); *Taylor v. U.S.*, 222 F. 2d 398, 95 U.S. App. D.C. 373 (1955). The "plain error" in the case at bar is that the jury was instructed on the charge of *agreeing* to make such payments. And the petitioner was not so charged in the indictment.

In *U.S. v. Roach*, 321 F. 2d 1 (1963), a strikingly similar case on this issue, the defendant was charged with "putting in jeopardy" the lives of certain bank employees by using a gun to commit a robbery. The statute under which he was charged read that whoever in committing the offense "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or devise * * *" (18 U.S.C.A., Sec. 2113).

The Court in its instructions to the jury read the statute including the part relating to "assaults any person". The

Third Circuit Court of Appeals held this was error under *Stirone v. U.S., infra,* and was so clear that the appellant was not precluded from raising it notwithstanding that he failed to object to the charge.

In *Stirone v. U.S.,* 361 U.S. 212, 80 S. Ct. 270, 4 L.ed. 2d 252 (1960), the defendant was charged with interfering with interstate commerce by obstructing the movement of sand from outside Pennsylvania to a concrete manufacturing plant in that state. The government was permitted to introduce evidence of an effect on interstate commerce in that the concrete to be made from the sand was used for constructing a mill which would manufacture steel to be shipped in interstate commerce. The Court also instructed the jury that the guilt as to the interstate commerce aspect could rest on a finding that the sand had been shipped from another state into Pennsylvania or that the concrete was used for constructing a steel mill which would manufacture steel to be shipped in interstate commerce.

The Supreme Court held it was error to submit the second question to the jury. The indictment did not include it and the indictment could not be amended or broadened except by the grand jury. Citing *Ex parte Bain,* 121 U.S. 1, 7 S. Ct. 781, 30 L.ed. 849 (1887), the Court held that a trial court can not permit a defendant to be tried on charges that are not made in the indictment.

The foregoing contention was presented to the Sixth Circuit Court of Appeals on the appeal and again in the Petition for Rehearing, which was denied. It did not see fit in either instance to comment on it. It is submitted that the decision in the case at bar, conflicts with *Stirone* and *Roach, supra.* It is also noteworthy that it conflicts with previous decisions of the Sixth Circuit, *Maxwell v. U.S.,* 277 F. 2d 481 (1960); *Epstein v. U.S.,* 174 F. 2d 754 (1949).

B. Each of the 32 counts of the indictment against the petitioner states that on a certain date he did unlawfully, wilfully and knowingly pay and deliver and cause Youngstown to pay and deliver a certain sum of dollars to the co-defendant. It is apparent that the indictment is drawn from the language of the statute. It is equally apparent the indictment states a violation under the statute, which outlaws all payments between an employer and a labor representative with stated exceptions, *U.S. v. Ryan*, 350 U.S. 299, 76 S. Ct. 400, 100 L. ed. 335 (1956). However, the government presented proof of a substantially different nature. Taken in its most positive form, it demonstrates that the payments were not money but checks, that the payments were not delivered to the co-defendant, but to Ram Transport, Inc. It did not even show that the checks were merely delivered to, and received and relayed by, Ram Transport, Inc. to the co-defendant. Instead, viewing the evidence as most favorable to the government, it showed the checks were delivered to and received by Ram Transport, Inc., were endorsed by Ram Transport, Inc. and deposited in a Ram Transport, Inc. account. It was then shown that the co-defendant during this period received substantial amounts of money from Ram Transport, Inc. However, the total amount received by him from Ram was greatly in excess of the total amount of the checks. In addition, the periodic amounts received by the co-defendant from Ram bear no relationship to the corresponding periodic amounts delivered by the petitioner to Ram. The evidence also showed that Ram paid for a boat owned or used by the co-defendant, that it paid the operating expenses of the boat, and that the funds from the sale thereof were redeposited in the Ram account. The evidence also showed money was lent by Ram to the co-defendant to buy land in Florida and that the loan was subsequently repaid. The government did not claim that Ram Transport, Inc. was a "sham" corporation. On the contrary, its evidence demonstrated that it was a bona

fide corporation. The indictment itself, in the first 32 counts referred to it as such.

The appellate court held that the petitioner was adequately informed of the charges against him. It held that "modern" rules of pleading do not require alleging each "step" of payment, citing *Korholz v. U.S.*, 269 F. 2d 897 (1959). It is apparently of the opinion that proof of an agency method is proof of a direct method of violating the statute which was charged. It further held that the conduit for payment was adequately set out in the indictment drawn against the co-defendant. It apparently indulges in the curious reasoning that a defendant may discover the specific nature of the charges against him by consulting the indictment drawn against his co-defendant. Then by making a comparison between the two, determine that the grand jury did not mean what it specifically charged against him.

It is submitted that this is not the correct test to be applied. The decision is in conflict with *Russell v. U.S.*, 369 U.S. 749, 8 L.ed. 2d 240, 825 S.Ct. 1038 (1962), and with *Stirone, supra. Russell* specifies two criteria for testing the sufficiency of an indictment. The first is "whether the indictment contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." (369 U.S. 749, 763). It is felt the facts presented above amply demonstrate that the indictment did not contain the elements of the offense *intended* to be charged, nor did it sufficiently apprise the petitioner of what he must be prepared to meet.

The decision also conflict with *U.S. v. Lippi*, 193 F.S. 442 (1961). *Lippi* refused to follow *Korholz, supra,* which the appellate court here relied upon, and applying *Stirone, supra,* held the correct test to be: "whether there is a sub-

stantial possibility, tested from the perspective of the presumption of innocence, that counsel will be unprepared to meet proof inconsistent with the charges contained in the indictment." (193 F.S. 439, 442.) While this is only a decision of a district court, the analysis of the issue is completely in conflict with the decision of the case at bar.

In *U.S. v. Raysor,* 294 F.2d 563 (1961), the Third Circuit rejected the agency theory of *Korholz.* The indictment charged the defendant with having sold narcotics to an agent of the Narcotics Bureau. The proofs showed the defendant had sold the narcotics to a "stool pigeon" who had been given the purchase money by the agent who had searched him immediately before and after the purchase. The Narcotics Bureau agent had been present at the sale and had taken immediate possession of the narcotics. The Circuit Court refused to accept the government's theory of agency that sale to an agent was sale to the principal. It held there was a fatal variance between indictment and proof, citing *Stirone* to the effect that the defendant has a substantial right to be tried only on charges presented in an indictment. It rejected the government's effort to "salvage its manifestly sloppy indictment."

The same rationale applies to the instant case. If the government intended to prove an indirect payment through a corporation it should have charged an indirect payment. Instead it chose to charge a direct payment and prove an indirect payment. It is interesting to note that it charged and attempted to prove an *indirect receipt* by the co-defendant through the corporation. It then reversed its own theory and attempted to prove what it had alleged was an *indirect receipt* by one defendant was a *direct payment* by the other defendant.

The appellate court further states the petitioner did not move for a bill of particulars. (The co-defendant did, and the motion was denied 39a). It overlooked the fact that there was no reason to do so prior to the presentation of the government's case. The indictment undoubtedly states an offense. The petitioner's contention is that it did not sufficiently apprise him of the offense which the government intended, and subsequently attempted, to prove. *Russell, supra,* also holds that it is a settled rule that a bill of particulars cannot save an invalid indictment. The indictment here was bad not because it failed to state an offense, but because it failed to state with sufficient particularity the offense which the government intended to prove. It also failed to provide the petitioner with the opportunity to prepare to meet proof inconsistent with the charges in the indictment. This failure did not become apparent until the government had commenced its case.

It is not that the facts as proved do not constitute a violation.. It is that this type of proof of a violation is not decipherable from the language of the indictment. The knowledge of the petitioner, after reading the indictment, as to the type of proof which he would be required to meet and the defense he would make, is significantly different from that of the evidence presented in support of the indictment.

There is a substantial difference between a simple charge that one paid money to another in specified amounts at specified times, and proof that he gave checks to a third party which deposited them in its account and then made money from this account available to another in the form of cash, the use of a boat, or loans to buy land. It is apparent that Ram was much more than merely a "conduit" to funnel payments to the co-defendant.

The variance demonstrated was prejudicial in that the petitioner expected and prepared to refute proof that he had made direct payments to the co-defendant. The government then presented proof of an indirect payment which it claimed was a direct payment on the theory that the co-defendant *was* the corporation. If this was the government's theory it is difficult to comprehend why the co-defendant was charged with receiving payment through the corporation. It is equally difficult to comprehend why the allegations of the joint indictment were different as to each defendant concerning the manner of making and receiving payment. If the payment was direct because the co-defendant *was* the corporation, why was the receipt not direct also?

When the method became apparent by which the government intended to prove its case, it was then too late for the petitioner to attempt to alter his theory of defense. The heart condition for which he was excused from trial for a period (488a) of time precluded his taking the stand to negative the government's unexpected method of proof.

The purpose for the requirement that the indictment inform the defendant of the specific charges against him is to allow him to prepare his defense before commencement of trial, not during the trial or after the government has presented its case. The confusion which still existed in the minds of the parties, except possibly the government, is evidenced by the discussion which took place during the examination of the requests to charge (1848a-1853a).

II. (A) The essence of the indictment was that the petitioner did unlawfully, wilfully and knowingly pay and deliver and cause Youngstown to pay and deliver certain amounts of money to the co-defendant. The government's first witness, the F.B.I. agent, testified that the petitioner

told him, on one occasion, that the 36 checks in question were paid by Youngstown to Ram Transport, Inc. for rental of a tractor pursuant to an agreement between the petitioner and the co-defendant. The agent further testified that, on another occasion, the petitioner told him the agreement was made with an officer of Ram Transport, Inc., whom he did not know.

The remainder of the government's evidence, both testimony and exhibits, was directed to the other essential elements of the alleged crime. Considered from the viewpoint most advantageous to the government, the evidence established that payments were made to Ram Transport, Inc., that the petitioner caused these payments to be made, that no value was received for these payments, that the co-defendant owned or controlled Ram Transport, Inc., that the co-defendant was a labor representative of Youngstown's employees, and that the petitioner knew the co-defendant was such a representative. In short, it established all the essential elements of the crime except that the petitioner wilfully and knowingly made these payments to the co-defendant. The only evidence of this element was the uncorroborated testimony of the F.B.I. agent. None of the other evidence corroborates this element; it was established by the admission alone. The record contains no other evidence that the petitioner knew or intended that the co-defendant would or should receive any of the checks, the proceeds therefrom, or any of the other benefits allegedly received by the co-defendant from Ram Transport.

The Appellate Court stated that petitioner relied merely on the defense of "fair market value", which the Government disproved. In effect, it holds he was convicted because he was unable to prove this defense. This is erroneous, both in fact and in the underlying assumptions.

In fact, the petitioner did not make the defense of "fair market value" except as it may be inferred from his cross-

examination of the witnesses *called by* the *government before* he had made *any* defense. He first mentioned that this was his defense at the time the Court was discussing the charge to be given the jury, which was after both sides had rested and the Court had denied petitioner's motions for acquittal.

The underlying assumptions are also erroneous. The Appellate Court stated the evidence established that Ram was owned by the co-defendant, that payment to it was payment to him for purposes of the statute, and that this was not a bona fide exchange for "fair market value". If payment to Ram was payment to the co-defendant, it is difficult to understand the need for and purpose of the evidence that he received money, loans and other benefits from Ram. It is also difficult to understand the Appellate Court's emphasis on this evidence. If payment to Ram was payment to the co-defendant, i.e. if he *was* Ram as alleged and supposedly proved, what is the relevance of this evidence? If the co-defendant *was* Ram and any payment to it was payment to him, there would be no necessity for proof that he received the money or other benefits from Ram.

There is an apparent confusion of the evidence, the necessary elements requiring proof, and the petitioner's defense. The defense of "fair market value received" becomes operable only when the defendant has admitted, or it is proved, he wilfully and knowingly made illegal payments to a proscribed person. His defense would then be that it was a *quid pro quo* transaction. However, it must first be proved that payments were made to a proscribed person. The petitioner made no admission that he made any payments to the co-defendant, nor did the evidence show he made any such payments, except for the uncor-

roborated testimony of the F.B.I. agent. Conversely, assuming payment to Ram was payment to the co-defendant, it would still be necessary to prove the petitioner knew that the co-defendant owned Ram to establish wilfulness and knowledge.

Therefore, the result remains the same regardless of the manner in which the problem is approached. The record is barren of any corroborating evidence that the petitioner wilfully and knowingly paid money to the co-defendant directly or to Ram Transport with knowledge that the corporation was owned by, or would "funnel" the money to, the co-defendant.

The decision of the Appellate Court is in conflict with *Opper v. U.S.*, 348 U.S. 84, 99 L.ed. 101, 75 S.Ct. 158 (1954) and *Smith v. U.S.*, 348 U.S. 147, 99 L.ed. 192, 75 S.Ct. 194 (1954). In *Opper* it was held that admissions by a defendant must be corroborated by other evidence. The Court also considered the extent of corroboration necessary to support a conviction:

> "However, we think the better rule would be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. (Citing *Smith*) It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts, plus the other evidence besides admission must, of course, be sufficient to find guilt beyond reasonable doubt". (348 U.S. 84, 93).

It held that there was "substantial independent evidence to establish *directly* the truthfulness" of the defendant's admission that he had paid money to a government employee. There was proof of a long distance call by the defendant to the employee's home, a check cashed by the defendant, and a round trip air line ticket in the employee's name to the defendant's home and return.

In the instant case, the independent evidence did not directly establish such truthfulness. It established the remaining elements of the crime but in no way furnished any further proof that the petitioner knew the co-defendant had any interest in or connection with Ram Transport or that he made or intended to make any payments to the co-defendant.

In *Smith* it was held that "all elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." (348 U.S. 147, 157.) The government may provide the necessary corroboration by introducing substantial evidence, apart from the defendant's admissions tending to show the defendant wilfully committed the offense.

In the instant case no such independent evidence was introduced to bolster the admission that the petitioner knew he had made the agreement to pay with the co-defendant. The trial court specifically recognized this fact (1815a). All of the evidence showed that the payments were made to Ram Transport, Inc., a bona fide corporation. There was no further evidence that the petitioner had any knowledge of any connection between Ram Transport and the co-defendant. It proved neither knowledge that the

payments would be passed on to the defendant nor knowlege that the co-defendant owned, and therefore "was", the corporation. The direct evidence may have proved all the remaining elements *except* that payments were wilfully and knowingly made to the co-defendant, either directly or through a corporation which the petitioner knew the co-defendant owned or with which he knew the co-defendant had some connection.

II. (B) The indictment charged the petitioner "paid and delivered" the particular sum in each of the counts "in the Eastern District of Michigan". The evidence showed checks were made in Youngstown, Ohio, at petitioner's direction, to Ram Transport, Inc. It further showed the checks were endorsed by the corporate secretary of Ram Transport, Inc., who was the estranged wife of the co-defendant, and deposited in the Ram Transport, Inc., account in the Detroit Bank & Trust Company. The record contains no proof as to either where, when, or how, the checks were delivered to Ram.

It is well settled that the Government must prove venue in the district where the defendant is tried and without such proof there can be no conviction, *U.S. v. Jones*, 174 F2d 746 (1949), 7th Circuit; *U.S. v. Browne*, 225 F.2d 751 (1955), 7th Circuit. Inasmuch as the Government charged payment and delivery in the Eastern District it would be incumbent upon it to at least establish that one or the other, if not both, occurred in the district charged, to establish venue. There was no evidence to show delivery in the Eastern District. Moreover, assuming *arguendo* that the checks were delivered to Ram Transport in the Eastern District on the alleged dates, there is still a complete lack of proof that payment was made in that district. The petitioner moved for acquittal after the Government had rested and again at the conclusion of the case.

The applicable law of Michigan at the time of the alleged offenses stated that:

> "* * * where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depositor but shall be authorized to follow the instructions of its immediate forwarding bank and any credit given by any such agent or sub-agent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank, which such agent has requested or accepted." (Mich. Stat. Ann. Sec. 23.332, C.L. '48, Sec. 487.602.)

A subsequent section stated: "An endorsement of an item by the payee or other depositor 'for deposit' shall be deemed a restrictive endorsement and indicate that the indorsee bank is an agent for collection and not owner of the item." (M.S.A. Sec. 23.334, C.L. '48, Sec. 487.604.) A third section relates "* * * where the item is received by mail by a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer." (M.S.A. Sec. 23.337, C.L. '48, Sec. 487.607.)

It is evident from the foregoing that payment was not proved to have taken place in the Eastern District of Michigan nor could it have been proved. The checks were drawn on, and paid, at a Youngstown, Ohio bank. The only act proved to have taken place in the Eastern District was the deposit of the checks in the Ram Transport account in Detroit. The Michigan statute cited above demonstrates that such a deposit constitutes only a conditional credit and makes the depository bank only an agent of the depositor for collection. The deposited check is "paid" when the

account of the drawer is charged, which in the instant case would have taken place in Youngstown, Ohio.

The Government recognized that neither payment nor delivery was proved to have taken place in the district and attempted to invoke the rule relating to a "continuing offense". The Sixth Circuit had previously held that such offenses are not continuing ones and that each act constitutes a single offense, *Krogmann v. U. S.*, 225 F2d 220 (1955). The Supreme Court in *Burton v. U.S.*, 196 U.S. 283, 49 L.ed. 482 (1905) had previously made the same holding in a case involving a similar offense.

However, the Sixth Circuit held in the instant case:

> "As to venue, we believe that deposit of the Youngstown checks in the Ram Transport bank account in Detroit (and collection thereon) was sufficient to represent payment of money in the Eastern District of Michigan.
>
> Further, no objection having been made to venue prior to verdict, objection thereto was waived. *Cagnina v. United States*, 223 F. 2d 149 (C.A. 5, 1955); *Thomas v. United States*, 267 F. 2d 1 (C.A. 5, 1959)."

The holding in the first paragraph conflicts with *Burton v. U.S., supra*, which held that venue was established in that case because the checks in question were passed by the defendant to the depository bank *unconditionally and without any special understanding*. Even under those facts, Justice Harlan dissented on the ground that the depository bank was only the agent for the defendant to present the checks for payment and receive the proceeds therefrom. The Michigan Statute as quoted above has reversed the assumption as to whether the deposit of checks is unconditional. All deposits are conditional and

the bank is only the agent of the depositor for presentment and payment of the checks.

The holding in the second paragraph conflicts with the other circuits. The Second Circuit in *U.S. v. Gross*, 276 F.2d 816 (1960), held that when the indictment alleges proper venue the defendant is entitled to await the government's case and move for acquittal when the government fails to prove all elements charged to have occurred in the district in fact occurred there. The Seventh Circuit in *U.S. v. Jones, supra*, held that a motion for acquittal made at the conclusion of all evidence properly raises the question of venue. In *U. S. v. Brothman*, 191 F. 2d 70 (1951), the Second Circuit adopted *Jones* and stated that the motion for acquittal need not specify the grounds therefor to raise the question of venue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari in the above entitled cause should be granted.

Respectfully submitted,

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APPENDIX

Nos. 15828-29

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROLLAND B. MCMASTER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM F. WOLFF, SR.,
Defendant-Appellant.

Appeal from the District Court for the Eastern District of Michigan, Southern Division.

DECISION

Decided March 25, 1965

Before: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. These appeals are from the convictions of a trucking company president (Wolff) and a Teamster Union official (McMaster) for violation of 29

U.S.C. §186.[1] This statute prohibits payment of money or "other thing of value" by an employer to, and acceptance of same by a representative of his employees, except in certain instances, including the sale of "goods or commodities for fair market value."

There were 32 counts in each indictment against each defendant alleging payment and acceptance of 32 separate sums, totaling $8,823.48, between September 12, 1956 and July 17, 1959. The Wolff indictment alleged that he caused the Youngstown Cartage Company, of which he was president, to make the payments to McMaster. The McMaster indictment alleged that he received the payments through Ram Transport, Inc. During the critical period McMaster was an official of Local 299—a Detroit local of the Teamsters Union—some of whose members were employed by Youngstown Cartage. Prosecution evidence tended to establish that at the same time McMaster was president and controlling stockholder of Ram Transport, Inc.

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[1] §186. *Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds*

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . .

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . . " 29 U.S.C. §186. (The statute as noted above was applicable during the period covered by these indictments. It has since been amended. See Title 29 U.S.C.A. §186, 1964 Cumulative Annual Pocket Part.)

Both men were tried jointly before a jury in the United States District Court for the Eastern District of Michigan, Southern Division. No motion for severance was made; but at trial the two defendants took different positions. Wolff, through his counsel, relied primarily upon the exception contained in Sec. 186 alleging that the disputed payments were "fair market value" for the rental by Youngstown of a truck owned by Ram. McMaster relied primarily upon denial that he knew anything about such payments, since he claimed he had given Ram Transport, Inc., to his wife prior to the dates of the payments.

Both of these arguments are reiterated before us on this appeal. A review of this lengthy record convinces us (as it did the jury) that evidence produced by the prosecution established that Ram Transport, Inc., was owned by McMaster during the period in question; that payment to it was payment to him for purposes of 29 U.S.C. §186; and that this was not a bona fide exchange of goods or services "for fair market value."

Most of the facts essential to the view just stated are actually undisputed in this record.

The facts establishing the 32 payments totaling $8,823.48 by Youngstown to Ram Transport, Inc., on the dates in question are undisputed.

The facts establishing the deposit (and collection) of these 32 checks in the Detroit Bank & Trust Company account of Ram Transport, Inc., are undisputed.

The fact that defendant Wolff was president and controlling stockholder of Youngstown Cartage Company during the period of these payments is undisputed.

The fact that defendant McMaster was business agent of Local 299 is undisputed, as is the fact that some of Youngstown's employees were members of Local 299.

The fact that defendant Wolff caused these payments to be made by Youngstown to Ram is undisputed.

The fact that Wolff himself personally drew a majority of the checks in question is undisputed.

The fact that defendant Wolff and defendant McMaster knew each other, met socially, and were involved in other substantial business ventures together is undisputed.

The fact that prior to the period of these payments defendant McMaster was controlling stockholder of record of Ram is undisputed. (McMaster owned 132 shares; Edward J. Powers owned 5 shares.)

The fact that during the period of these payments the corporate records remained unchanged in this regard is undisputed.

The fact that defendant McMaster had access to substantial sums of money from Ram during the period of these payments is undisputed.

And, finally, the fact that during all of the period in question McMaster was frequently involved both in Detroit and in Chicago in representing Youngstown's employees as a Teamster business agent in direct negotiations with Wolff is also undisputed.

Two factual disputes are advanced—one by each defendant.

Wolff claims the payments were for rental of a truck owned by Ram for use by Youngstown division in Detroit. The prosecution undertook the burden of proving the negative of this defense. In so doing they called all of Youngstown's terminal supervisors in Detroit, six office employees from the Youngstown office, and twenty of their Detroit truck drivers. The evidence is too lengthy and repetitive to summarize, but we have read it in full and conclude that the overwhelming weight of the evidence indicates that there was no such Ram-owned truck employed by Youngstown at the Detroit terminal during the period in question.

Against this evidence defendant Wolff's witnesses did not identify the make, the weight, the license, or a specific date of use or a specific load carried. The jury plainly concluded, as they had a clear right to do, that there was no such truck.

McMaster claims that, without any record being made thereof, he gave ownership of Ram Transport, Inc., to his wife prior to these payments; that he was estranged from her during the period of the payments, and that he had no knowledge of them. These assertions appear to us to be largely upsupported and obviously they proved unpersuasive to the jury. McMaster's credibility was continually challenged on these and many other points during his testimony at trial. Plainly, the jury disbelieved him. A careful reading of McMaster's own testimony convinces us that the jury had a clear right to reach this conclusion.

McMaster relied primarily upon the facts that during the period in question his wife kept the books of Ram Transport, Inc., and signed all the checks on the Ram Transport account in the Detroit Bank & Trust Company, and that his was not an authorized signature as to the Ram Transport account during this period. He claimed that he and his wife had been separated in May of 1956 and that at that time he gave her Ram Transport, Inc., as to which he had acquired 100% of the stock in his own name on February 17, 1956.

No legal record of any such division of marital assets was ever made until a property setlement between McMaster and his wife Yvonne was signed December 19, 1960, prior to a decree of divorce between the parties, dated February 27, 1961.

During all the period in question it is undisputed that defendant McMaster and Yvonne McMaster maintained a joint savings account and a joint checking account at the Detroit Bank & Trust Company. McMaster admits that joint income tax returns were filed by him and his wife Yvonne for the years 1956 and 1957. The statutorily required Corporation and Securities Commission reports made to the state of Michigan by Ram Transport, Inc., which defendant McMaster claims were prepared and signed by his wife Yvonne without his knowledge, showed

defendant Rolland McMaster as president and 100% stockholder of Ram Transport, Inc., during the years 1956, 1957 and 1958.[2]

Defendant McMaster contends that the division of property in 1956 between him and his wife Yvonne included her exclusive ownership of Ram and his exclusive ownership of another trucking company called M & G Trucking Company. But it appears that Yvonne McMaster was authorized to sign checks on the M & G Trucking Company account during all of this period and that he wasn't——exactly the same situation as prevailed in relation to Ram.

Yvonne McMaster did not testify in this trial She had died May 26, 1961.

It may be pertinent to quote McMaster's own testimony as to his relationship with her during the period covered by this indictment.

> "Q. (By Mr. Noonan) Now, if the decree was dated February 27, 1961, how can you account for the fact that this division of property you just referred to took place in 1956, five years earlier?
>
> "A. As I said about five minutes ago, I kept the M & G Trucking Company; she kept Ram Transport, and we had made an agreement. That is what it was. Nobody was—this wasn't one of those things where everybody is mad. We were still friends. After this was over, she also kept the books for my farm and she —we weren't mad at each other as far as not speaking to each other.
>
> "Q. Did you continue to be associated in business with her?
>
> "A. Well, in this respect, I helped her every way I could help her, and Mr. Powers also, and kept right on.

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[2] We believe the District Judge was correct in admitting these exhibits. 28 U.S.C. §§1732-1733. See also Rule 44, Fed. R. Civ. P.

"Q. Did she during this period or subsequent to the early part of 1956—May, I believe you said—did she keep the books for M & G Truck Company?

"A. M & G, she kept the books for them also, yes. She kept them for the farm and M & G Trucking.

"Q. Now, after this separation in 1956, Mr. McMaster, what further connection did you have with Ram Transport?

"A. Well, the only connection I had with Ram Transport after that was any way that I could help either he or she, I helped them. That is the only connection I had with the outfit."

This last observation by McMaster does not, however, appear to be entirely accurate.

The facts show substantial access to Ram funds on the part of Rolland McMaster personally during all of this period.

1) It is undisputed that on August 31, 1957, a credit of $1,500 to Rolland McMaster was entered on the Ram books to wipe out a loan previously owed by McMaster to Ram.

2) McMaster admits that a Ram check, dated July 18, 1958, for $3,000 was used by him for an investment in an Oakland County land deal. It is not claimed that this was ever repaid.

3) McMaster admits that a Ram check, dated February 15, 1960, for $3,000 was paid to the Idle Acres Farm account as to which he claimed sole ownership. This check was marked "Loan" on the Ram books, but apparently has not been repaid.

4) McMaster admits that a Ram check, dated May 12, 1959, for $12,503.50 was used by him for an investment in a Florida land deal.[3] It appears that this amount was repaid to Ram on August 14, 1959.

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[3] On the occasion of this payment it is interesting to note that appellee's Exhibit 55 shows a Ram bank balance of $12,736.60 before deduction of the check for $12,503.50, and a balance of $233.10 thereafter.

5) McMaster admits that a 32-foot Chris Craft boat was purchased for him out of Ram funds in May of 1956, the purchase price being $9,000. It appears that the down payment was made on this boat by a Ram check, dated May 23, 1956, in the amount of $1,000.

And McMaster admits that the other payments on the boat were likewise made by Ram, as well as payment of expenses for the operation of the boat. It also appears that when the boat was sold, although McMaster is positive in asserting his personal ownership, the funds derived from the sale were redeposited in the Ram account.

6) It is also undisputed that Ram checks totaling $9,950 were deposited in the joint account maintained by McMaster and Yvonne McMaster during the period July 18, 1958 to May 23, 1960. McMaster's testimony in this regard is that though he had the right to write checks on this account, he never did, and that these funds were used by Yvonne for her separate business ventures and expenses.

McMaster, as indicated above, did indeed separate from Yvonne McMaster and a decree of divorce was ultimately entered between them in February of 1961.

Subsequent thereto McMaster was married again to an Elaine Mastaw. Cross-examination revealed that prior to his marriage to the present Mrs. McMaster, and during the period of 1956-1959, McMaster had also "helped" Elaine Mastaw establish a truck leasing company and that she and her brother had been involved in Youngstown Trucking Company's purchase of a site for a new terminal in Detroit. As McMaster put it: "I think she [Elaine Mastaw] and he [Miss Mastaw's brother] helped him [defendant Wolff] find a piece of land to put his trucks on and was involved in a house on the land."

The basic purpose of the statute under which these defendants were convicted is to prevent corruption in labor-management relationships affecting interstate commerce. The statute plainly does not require proof of the *quid pro quo*.

The Supreme Court has set forth this interpretation of the purposes of the statute:

> "As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative.
>
> "The legislative history supports these conclusions. As passed by the House of Representatives, the Hartley Bill forbade employer contributions to union welfare funds, and made it an unfair labor practice to give favors to 'any person in a position of trust in a labor organization. . . .' H.R. 3020, 80th Cong., 1st Sess., §8(a) (2). The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a 'case where the union representative is shaking down the employer. . . .' 93 Cong., Rec. 4746. The resulting Senate amendment made it criminal both for the employer and the 'representative' of employees to engage in such practices." *United States v. Ryan*, 350 U.S. 305-06 (1956).

We feel that there is ample evidence from which the jury could have found that each of these defendants was guilty beyond a reasonable doubt.

While under the situation just referred to above we do not reverse on factual grounds, for purposes of issues to be dealt with subsequently, we also note that on this lengthy record the evidence establishing willful violation of Sec. 186 by these defendants was not merely ample, it was, in our judgment, overwhelming.

Both appellants also attack the indictments as constitutionally vague and contend that venue was not established in the United States District Court for the Eastern District of Michigan, Southern Division.

We believe the indictments were sufficiently clear and specific to meet all constitutional requirements. Defendant Wolff specifically complains that he was charged with paying money to McMaster and that his indictment did not

allege the conduit (Ram Transport, Inc.) through which the payments were claimed to have been made. We find no necessity under modern rules of pleading of alleging each step of payments in the indictment. *Korholz v. United States of America*, 269 F.2d 897, 901 (C.A. 10, 1959). Rule 7(a), Federal Rules of Criminal Procedure.

Further, in the McMaster indictment (drawn and filed at the same time) this conduit for payment was spelled out. Defendant Wolff did not move for a bill of particulars prior to trial.

We think that defendants were adequately informed of "the nature and cause of the accusation." *United States v. Dickerson*, 337 F.2d 343 (C.A. 6, 1964).

As to venue, we believe that deposit of the Youngstown checks in the Ram Transport bank account in Detroit (and collection thereon) was sufficient to represent payment of money in the Eastern District of Michigan.

Further, no objection having been made to venue prior to verdict, objection thereto was waived. *Cagnina v. United States*, 223 F.2d 149 (C.A. 5, 1955); *Thomas v. United States*, 267 F.2d 1 (C.A. 5, 1959).

The only substantial claim of error we have found in our review of these briefs and records is that of McMaster pertaining to the admission of an FBI agent's testimony concerning statements made to him by Wolff as set out below:

"Q. (By Mr. Merrill) With respect, first of all, to June when you talked to him in June, did you discuss with him on that occasion the payments from Youngstown Cartage to Ram Transport?

"A. Yes, I did.

"Q. Did he indicate to you whether or not such payments had been made?

"A. He did.

"Q. Did he indicate as to any reason for the making of these payments?

"A. Yes, he did.

"Q. What did he say with respect to that, in June of 1961?

"A. Mr. Wolff at that time said that these payments were for rental of a tractor type truck for use in the Youngstown Cartage Company Detroit terminal.

"Q. Did he specify what kind of a tractor or its function?

"A. He did not specify the make, the model, the type of tractor.

"Q. Did he indicate as to whether the tractor would be used in the city of Detroit, or would it be used over-the-road? Did he say anything with respect to that?

"A. He wasn't explicit at that time concerning the rental of the tractor.

"Q. Or as to what the tractor would be used for?

"A. Not at that time.

"Q. Did he indicate the amount of rental that was to be charged for this tractor?

"A. He did not recall what the rental was to be—what the amount of the rental would be for the use of this tractor.

"Q. Did he indicate at that time anything else with regard to the terms of the rental?

"A. He said the terms of this agreement were oral between he and Rolland McMaster—

"Mr. Noonan (interposing): Your Honor, I object to that, any statements made by Mr. Wolff concerning Mr. McMaster; purely hearsay as to him.'"

McMaster claims that it was error for the statement of his co-defendant Wolff to have been admitted against him (McMaster) absent a prompt warning by the trial judge to the jury to disregard Wolff's statement completely as far as defendant McMaster was concerned.

Such an admonition was given later in the Judge's charge.

It is defendant McMaster's contention that the admonition to the jury was too long delayed, (see *United States v. Duff*, 332 F.2d 702 (C.A. 6, 1964)) and inadequate when given.

Appellee on the other hand contends that the admonition was adequate and the error in failing to give it coincidentally with the admission of the statement was not prejudicial within the meaning and purpose of Rule 52(a) of the Federal Rules of Criminal Procedure. Appellee also argues, in effect, that defendant's counsel waived any possible objection.

This last contention is given some weight by the fact that defendant's counsel, after objecting to the testimony on grounds of hearsay, did not request a judicial admonition to the jury that it disregard the testimony as to McMaster, and indeed never did make such a request. The admonition contained in the charge (which we deem adequate) was requested by the prosecution. It is also true that Gylph, the FBI agent, was cross-examined extensively by counsel for Wolff as to statements contradictory to the one objected to and that Wolffs' subsequent statements to Glyph (generally to the effect that the Youngstown-Ram "lease" agreement was not made with McMaster) went into the record without objection from McMaster's counsel.

Whatever merit the waiver argument may have, we choose not to base decision thereon. For obviously, McMaster's counsel was presented with a difficult choice as to whether or not to continue to object to hearsay evidence when it was favorable to his client's position.

The evidence quoted was, of course, plainly admissible as to defendant Wolff as a statement against interest. But as to defendant McMaster's objection on grounds of hearsay, we have another matter.

This was not a conspiracy case. Wolff was not an agent of McMaster and the statement (admissible as to Wolff) was not admissible as to McMaster. 4 Wigmore, *Evidence*, §§1076, 1079 (3d ed. 1940).

Further, recently in *United States v. Duff, supra*, we have held that a delay in the giving of an admonition to the jury to disregard evidence can be prejudicial.

Here there was error in delaying the admonition, and our question is whether this error was an invasion of substantial rights of defendant McMaster or harmless error?

The proposition that jury verdicts shall not be reversed because of harmless error is set forth both in statute[4] and in rule.[5] Nonetheless, in American courts (particularly as distinguished from the English) there is a tendency to give the defendant the benefit of any substantial doubt[6] as to whether the error is harmless—and we have sought here to keep that fact in mind.

Defedant cites *Krulewitch v. United States,* 336 U.S. 440 (1949), to us on this point. In *Krulewitch* we find this discussion:

> "It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U.S.C. (1946 ed.) §391. In *Kotteakos v. United States,* 328 U.S. 750, we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. We have such doubt here. The Florida District Court grand jury failed to indict. After indictment in New York petitioner was tried four times with the following results: mistrial; conviction; mistrial; conviction with recommedation for leniency. The revolting type of charges made against this petitioner by the complaining witness makes it difficult to believe that a jury convinced

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[4] "Sec. 2111. *Harmless error.*

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. §2111.

[5] "Rule 52. *Harmless error and plain error.*

"(a) *Harmless error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 52 FED. R. CRIM. P.

[6] The actual test language employed is, of course, "grave doubt" and "substantial influence" upon the verdict. *Kotteakos v. United States,* 328 U.S. 750, 765 (1946).

of a strong case against him would have recommended leniency. There was corroborative evidence of the complaining witness on certain phases of the case. But as to all vital phases, those involving the sordid criminal features, the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best. We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner." *Krulewitch v. United States, supra* at 444-45.

On our review of the entire record in McMaster's case, we find this case at the opposite extreme from *Krulewitch* in the range of criminal appeals claiming error in admission of evidence. Where the court there found "grave doubt" as to guilt, we find (excluding the Wolff statement) that the evidence of McMaster's willful violation of this statute was "overwhelming." *Berger v. United States*, 295 U.S. 78, 89 (1935).

We find this case much closed to the factual situation of *Lutwak v. United States*, 344 U.S. 604 (1953), than to *Krulewitch v. United States, supra.*

No other meritorious appellate issues are presented.

The convictions are affirmed.

STATUTES INVOLVED

29 UNITED STATES CODE

186. Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . .